

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)
Connect America Fund	) WC Docket No. 10-90

**COMMENTS OF THE AMERICAN CABLE ASSOCIATION  
ON PROCEDURES RELATING TO AREAS ELIGIBLE FOR FUNDING AND  
ELECTION TO MAKE A STATEWIDE COMMITMENT IN PHASE II OF THE  
CONNECT AMERICA FUND**

The American Cable Association (“ACA”) respectfully submits comments in response to the Wireline Competition Bureau’s Public Notice seeking comment on procedures relating to areas eligible for funding and election to make a statewide commitment in Phase II of the Connect America Fund.<sup>1</sup> The Bureau proposes procedures for challenging the designation of an area on the National Broadband Map (“NBM”) and for an election by a price cap local exchange carrier (“LEC”) to make a statewide commitment to accept Phase II support.

**I. INTRODUCTION AND SUMMARY**

ACA has filed extensive comments on the development of a challenge process for NBM designations, including as part of the Commission’s FNPRM on CAF Phase I.<sup>2</sup> Like the Commission, ACA seeks to ensure that CAF support is not provided in areas where providers already offer the requisite broadband service. To that end, ACA has proposed a challenge process that (1) relies on the NBM as the presumptive source of accurate information, (2) encourages providers to participate in the mapping process so the NBM contains up-to-date

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<sup>1</sup> See Public Notice, DA 12-2075 (Dec. 27, 2013).

<sup>2</sup> See e.g., Reply Comments of the American Cable Association on Public Notices DA 12-1961 and DA-2001, Updating and Correcting the List of Unserved Areas on the National Broadband Map for Connect America Phase I Incremental Support, WC Docket No. 10-90 (Jan. 24, 2013).

accurate information, (3) places the initial burden on challengers to submit sufficient probative evidence before the process can move forward, and (4) is not administratively burdensome.

ACA bases its comments herein on the development of a Phase II challenge process on these same objectives and submits:

- The Commission should use 3 Mbps/768 kbps as a proxy on the NBM for 4/1 Mbps in developing the initial list of eligible areas, and a party challenging the designation should present evidence demonstrating whether this proxy speed is being provided.
- The Commission should presume the NBM is accurate, and a party challenging the NBM's designation should provide sufficient probative evidence to make a prima facie case the designation is incorrect.
- While the Commission has set forth latency and capacity criteria as part of the public interest obligations for broadband providers, these criteria have not been precisely defined. Accordingly, until the Commission can provide more precise latency and capacity metrics, it should not use them as a basis for a challenge to the NBM.
- To ensure it receives adequate input into the challenge process, the Commission should require a price cap LEC at the time a challenge is filed to inform (via certified mail) providers designated as serving the "challenged" census block on the NBM. Then, the Commission should determine whether the price cap LEC's evidence is sufficient to make a prima facie case that the designation may be incorrect. Next, the Commission should publish a list of all census blocks that are potentially unserved because sufficient evidence was provided by the price cap LEC and ask for responses from those claiming to serve the area.
- 45 days is sufficient to file a challenge to a NBM designation. However, the response period should not begin until the Commission reviews the challenger's evidence to ensure it is sufficiently probative and then publishes a list of census blocks that are potentially unserved because sufficient evidence was provided (see ACA's proposal above). Further, 20 days is insufficient, particularly for a smaller provider with limited staff and resources, to gather adequate evidence to respond to the challenger's evidence that was deemed by the Commission as being probative. This is especially the case if multiple price cap LECs and numerous census blocks are involved. ACA does not seek to delay the process unnecessarily, but the Commission should provide at least 40 days for a response.
- ACA agrees that the Commission should not consider evidence to be sufficient if it only contains information about speculative broadband deployments. However, there is good reason for the Commission to take into account deployments that are actually in progress and where the provider has publicly announced that service

will be available within a reasonable period. In these instances, the provider should be permitted to provide – and the Commission should accept – evidence on the progress of construction and public announcements when service will be provided.

- ACA agrees that the preliminary list of eligible census blocks would only include those that are completely unserved, and challenges would only be permitted on the census block level (and not on a sub-census block level).

Finally, in regard to the process whereby a price cap LEC makes an election, ACA opposes keeping the responses confidential prior to some later announcement by Commission. This information would almost certainly be relevant to ACA members who are in the process of planning future “unsupported” deployments in these areas. As such, it would be contrary to the public interest to withhold it. In addition, ACA agrees with the Commission that a price cap LEC should submit a preliminary deployment plan at the time it accepts a statewide commitment. This plan should include at least information showing both census blocks and unserved locations within those blocks where support will be used for broadband deployments, locations that will receive 6/1.5 Mbps service, and the proposed timeline for deployment. The plan also should include locations where the price cap LEC will be using Phase I support (either frozen legacy or incremental support) to deploy broadband service.

## **II. PROCEDURES FOR CHALLENGING WHETHER AN AREA IS SERVED BY AN UNSUBSIDIZED COMPETITOR**

After adopting the cost model and releasing an initial list of eligible census blocks in price cap LEC territories where Phase II support may be used, the Commission directed the Bureau to provide parties an opportunity to challenge whether an area is unserved by an unsubsidized competitor. In this proceeding, the Bureau proposes procedures for the challenge process. ACA responds below to particular parts of those procedures.

**Bureau Proposal:** Use 3 Mbps/768 kbps as a proxy on the NBM for 4/1 Mbps in developing the initial list of eligible areas, and a party challenging the designation of an area as served by a provider offering broadband at 3 Mbps/768 kbps should present evidence demonstrating whether this proxy speed is being provided.<sup>3</sup>

**ACA Response:** ACA agrees with the Bureau’s proposal. ACA recognizes that price cap LECs’ DSL networks designated on the NBM as offering broadband service at speeds of 3 Mbps/768 kbps may not in fact be capable of offering 4/1 Mbps service due to the technical limitations of the service.<sup>4</sup> That is the basis for their proposal to increase the proxy to 6/1.5 Mbps in comments filed recently on the Phase I incremental support challenge process.<sup>5</sup> However, cable networks operate based on a different technology (“DOCSIS”), which does not have the same restrictions on speeds, especially upstream speeds, as DSL networks. Thus, if a cable provider is shown on the NBM as offering a 3 Mbps/768 kbps broadband service, it is likely actually offering a 4/1 Mbps broadband service (but less than a 6/1.5 Mbps service). In those instances, increasing the proxy to 6/1.5 Mbps as proposed by price cap LECs would cause the Commission to designate census blocks where cable operators provide service of 4/1 Mbps as unserved when in fact they are served. Such a misguided policy would undermine the Commission’s objective of not providing support where an unsubsidized competitor provides service.

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<sup>3</sup> See Public Notice, ¶ 9.

<sup>4</sup> The performance capability of a DSL transmission declines greatly as the distance of the transmission increases. Thus, a transmission capable of delivering 768/200 kbps broadband service may not be capable of delivering 4/1 Mbps service. To achieve a higher speed transmission, the distance must be shortened. This is most often achieved by using a fiber feeder to reduce the distance of the copper loop.

<sup>5</sup> See e.g., Comments of CenturyLink, WC Docket No. 10-90 at 9-10 (Jan. 9, 2013) and Comments of the United States Telecom Association, WC Docket No. 10-90 at 3-6 (Jan. 9, 2013) (“USTelecom Comments”).

**Bureau Proposal:** A party challenging the designation on the NBM as not accurate would need to provide supporting evidence.<sup>6</sup>

**ACA Response:** ACA submits that the Commission should presume the NBM is accurate. This would indicate to all parties that there is value in participating in the regular process to update the NBM and further ensure that government agencies have a reliable source of baseline information they could use to pursue broadband development programs. It also would ease the administrative burden on the Commission by discouraging parties from submitting challenges that were not sufficiently supported.

A party challenging the NBM's designation should provide sufficient probative evidence to make a prima facie case the designation is incorrect. This requirement too would lessen the Commission's administrative burden by eliminating frivolous or otherwise speculative claims. It also would ensure that smaller providers, many of whom may be members of ACA, would not face an undue burden of having to respond to challenges that are not meritorious.<sup>7</sup> Accordingly, the Commission should modify its proposal to ensure a challenger provides sufficient probative evidence to make a prima facie case that the NMB is incorrect.

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<sup>6</sup> See Public Notice, ¶ 11.

<sup>7</sup> ACA seeks to avoid the situation where a price cap LEC claims that it faces no competition in any of the census blocks where it provides service, putting the burden on its competitors to respond with evidence that they provide service in the challenged area. Such a scheme could arguably be successful under the proposal put forth by the Commission.

**Bureau Proposal:** A challenge to a census block being served “may be based on any or all of the Commission’s broadband performance metrics – speed, latency, and/or capacity (i.e. minimum usage allowance).<sup>8</sup>

**ACA Response:** Unlike speeds, which are easily measurable, the Commission only requires latency to be sufficiently low “to enable use of real-time applications, such as VoIP,” and it declined to adopt specific minimum capacity requirements.<sup>9</sup> In the Public Notice, the Commission attempts to flesh out the metrics for latency and capacity by providing examples of possible probative evidence for these requirements, *e.g.* for latency, whether a provider is actually offering voice service in an area, and for capacity, a website printout of the minimum usage requirement.<sup>10</sup> ACA appreciates the Bureau’s attempt to establish more precise metrics for these two requirements. However, it notes that some of its members may provide low-latency broadband service but may not directly offer VoIP service. Instead, they rely on customers using over-the-top VoIP providers. As for capacity, many ACA members do not have, and accordingly do not list, capacity limitations. Consequently, the Commission’s proposals are insufficient to define adequately probative evidence for these two requirements.<sup>11</sup> Instead, the continued lack of precise definition for these requirements would result in smaller providers facing

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<sup>8</sup> *See id.*

<sup>9</sup> *See Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 17663, ¶ 96-97 (2011) (“*Connect America Fund Order*”), *pet.* for review pending sub nom. In re: FCC 11-161, No. 11-9900 (10<sup>th</sup> Cir. filed Dec. 8, 2011).

<sup>10</sup> *See* Public Notice, ¶¶ 13-14.

<sup>11</sup> ACA notes that in recent comments, USTelecom discussed the lack of clarity of the latency and capacity metrics and shortcoming and requested that the Commission address this concern. *See* USTelecom Comments at 9-10.

unwarranted challenges. Until the Commission can provide more precise latency and capacity metrics, it should not use them as a basis for a challenge.

**Bureau Proposal:** “To assist in the development of a more complete record...ensure that potentially interested parties are aware of the opportunity for public input.”<sup>12</sup>

**ACA Response:** ACA suggests the Commission adopt the following process to ensure sufficient input. First, a price cap LEC challenging a census block designation on the NBM should file with the Commission sufficient evidence to support the challenge. At the same time, the LEC should notify (via certified mail) any provider designated on the NBM as providing broadband service in that census block of that challenge, provide it with the evidence submitted to the Commission, and inform the provider that it may rebut the challenge if the Commission deems the LEC has provided sufficient evidence. The Commission should then determine whether the price cap LEC’s evidence is sufficient to make a prima facie case that the designation may be incorrect. After reviewing all challenges from price cap LECs, the Commission should publish a list of all census blocks that are potentially unserved because sufficient evidence was provided and ask for responses from those claiming to serve the area. (The Commission can undertake a similar process for a competitive provider claiming a NBM designation is inaccurate because it is providing service in the relevant census block – with one exception. Since price cap LECs normally follow Commission notices, the competitive provider need not inform the LEC when it files a challenge.)

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<sup>12</sup> Public Notice, ¶ 16.

**Bureau Proposal:** Once the Commission releases an initial list of eligible census blocks, challengers would have 45 days to file, and parties seeking to rebut the challenges would have 20 days to respond with their evidence.<sup>13</sup>

**ACA Response:** ACA believes 45 days is sufficient to file a challenge to a NBM designation. However, the response period should not begin until the Commission reviews the challenger's evidence to ensure it is sufficiently probative and then publishes a list of census blocks that are potentially unserved because sufficient evidence was provided (see ACA's proposal above). Further, 20 days is insufficient, particularly for a smaller provider with limited staff and resources, to review evidence from potentially multiple price cap LECs in numerous census blocks and then gather adequate evidence to respond. ACA does not seek to delay the process unnecessarily, but the Commission should provide at least 40 days for a response.

**Bureau Proposal:** "Where the Bureau finds that it is more likely than not that a census block is inaccurately classified as served or unserved," it should modify the classification.<sup>14</sup> Where both the challenger and respondent provide credible evidence, the default determination will be that the NBM is accurate.<sup>15</sup>

**ACA Response:** As discussed above, the Commission should presume the NBM is accurate, both to indicate to providers that participation in the broadband mapping process has value and to discourage challenges based on limited evidence. For the same reasons, ACA submits that the Commission first vet the challengers evidence to ensure it

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<sup>13</sup> See *id.*, ¶ 17.

<sup>14</sup> *Id.*, ¶ 18.

<sup>15</sup> See *id.*



is sufficiently probative. It agrees that if both the challenger and respondent provide credible evidence, the existing designation on the NBM should remain in effect.

**Bureau Proposal:** Evidence supporting a claim that an area is served should demonstrate that broadband service is currently available and “not on announced market expansion plans that may occur at some future date.”<sup>16</sup>

**ACA Response:** ACA agrees that the Commission should not consider evidence to be sufficient if it only contains information about speculative broadband deployments. However, there is good reason for the Commission to take into account deployments that are actually in progress and where the provider has publicly announced that service will be available within a reasonable period. After all, it would be counterproductive to provide scarce government universal service support for deployments that are not required to be completed for up to five years when an unsubsidized provider will be offering service in much less time (and likely with much greater capability). That is particularly the case when another government entity, e.g. the Rural Utilities Service, has provided either grant or loan support for the build. In these instances, the provider should be permitted to provide – and the Commission should accept – evidence on the progress of construction and public announcements when service will be provided.

**Bureau Proposal:** The preliminary list of eligible census blocks would only include those that are completely unserved, and challenges would only be permitted on the census block level (and not on a sub-census block level).<sup>17</sup>

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<sup>16</sup> *Id.*, ¶ 20.

**ACA Response:** ACA agrees with the Bureau’s proposal because it would ease the administrative burden both for the Commission and for smaller providers that participated in the sanctioned mapping process and are designated on the NBM as serving a census block. In addition, unsubsidized providers are most likely to invest their own funds to expand their provision of broadband service in census blocks where they already provide service. The Commission should encourage such activities since they will help achieve the Commission’s broadband deployment objectives and do so without use of limited universal service funding.

### **III. PROCEDURES FOR IMPLEMENTING THE PRICE CAP CARRIER ELECTION TO MAKE A STATEWIDE COMMITMENT**

The Commission inquires about the process whereby a price cap LEC makes an election and the information a LEC should provide when it elects a statewide commitment, including the network technology and locations where 6/1.5 Mbps service will be deployed.<sup>17</sup> First, ACA opposes keeping the election responses of the price cap LECs confidential prior to some later announcement by Commission. This information would almost certainly be relevant to ACA members who are in the process of planning future “unsupported” deployments in these areas. As such, it would be contrary to the public interest to withhold it. In addition, as a general matter, the Commission should favor transparency involving critical decisions.

Second, ACA believes it is crucial that the price cap LECs submit sufficiently precise data about their use of Phase II support to deploy broadband to unserved locations. Without this information, the Commission cannot ensure that support is properly spent for the intended purposes of the program. To that end, ACA agrees with the Commission that price cap LECs

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<sup>17</sup> See *id.*, ¶ 21.

<sup>18</sup> See *id.*, ¶ 25.

should submit a preliminary deployment plan at the time of acceptance. This plan should include at least information showing both census blocks and unserved locations within those blocks where support will be used for broadband deployments, locations that will receive 6/1.5 Mbps service, and the proposed timeline for deployment. The plan also should include locations where the price cap LEC will be using Phase I support (either frozen legacy or incremental support) to deploy broadband service. Not only is collection of this information essential, but it should not impose an undue burden on carriers receiving millions of dollars of government (consumer) funding.

Respectfully submitted,



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